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CURRENT TOPICS.

In *Rugh v. Ottenheimer*, recently decided by the Supreme Court of Oregon, it is said that marriage is a contract *sui generis* and *juris publici*, and is not subject to the constitutional inhibition of legislative acts impairing the obligation of contracts. The constitution of that state, exempting from execution for the husband's debts the lands of a married woman, was held to apply to the lands of a married woman who was married before the adoption of the constitution. The Court of Appeals of Kentucky, in speaking of the legislative control over marriage, use the following language: "Marriage being much more than a contract, aad depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts." Maguire v. Maguire, 7 Dana, 183.

In *Foster v. Metts*, the defendants were contractors to carry the mails from a point in Kentucky to a point in Mississippi. The plaintiff had $200 in money stolen from the mail on this route, by the carrier employed by the defendants to carry the mail. The plaintiff insisted that the defendants were responsible for the safe carrying of his money, and should make good to him the loss. The latter at first refused to recognize any liability on their part for the loss, but finally upon plaintiff 's agreeing to wait a few months for payment, they gave their note for the amount claimed, due at the time agreed upon. The note was not paid at maturity, and in an action brought to recover upon it, it was held by the Supreme Court of Mississippi that he could not recover. A contractor for carrying the mail is neither a common carrier nor a private carrier. He does not carry for individuals, nor receive any compensation from them. He has no knowledge of the mail-matter he carries, and no control over it, except to obey the instructions of the Post-office Department. Letters and packets are inclosed in government mail-bags, secured by locks provided by the government, and at all times subject to the supervision and control of the officers and agents of the government in the Post-office Department, who may open the mail-bags and inspect the mail-matter they contain at will. Contractors for carrying the mail are instruments of government whereby it performs the function of transmitting mail-matter from place to place in the execution of this part of its business. They are responsible for their own misfeasances, but not for those of their assistants. Their obligation is to the government. It is well settled that postmasters are not liable for losses occasioned by the sub-agents, clerks, and servants employed under them, unless they are guilty of negligence in not selecting persons of suitable skill, or in not exercising a reasonable superintendence and vigilance over their conduct. Story on Ag., sec. 319a; Story on Bail., sec. 464; 1 Am. Ld. Cas. 785; Shroyer v. Lynch, 8 Watts, 453; Wiggins v. Hathaway, 6 Barb. 632; Keenan v. Southworth, 110 Mass. 474. In Conwell v. Voorhees, 13 Ohio, 523, and Hutchins v. Brackett, 2 Fost. 252, it was decided that contractors for carrying the mail are not responsible to the owner of a letter containing money transmitted by mail and lost by the carelessness of the of the agent of the contractors carrying the mail. The rules applicable to agents of the public were applied. The doctrine of these cases is criticised in Shearman and Redfield on Negligence (sec. 180), and has been disputed in Sawyer v. Corse, 17 Gratt. 230. In this case the money was stolen by the mail-carrier. As to that, he certainly was not the agent of the contractors for whom he was riding, and, if they were liable for his acts within the scope of his employment, they were not liable for his willful wrongs and crimes. McCoy v. McKowen, 26 Miss. 487; New Orleans, Jackson and Great Northern R. R. Co. v. Harrison, 48 Miss. 112; Foster v. Essex Bank, 17 Mass. 479; Wiggins v. Hathaway, 6 Barb. 632.

In *Tillson v. Robbins*, recently decided by the Supreme Court of Maine, the distinction between written or printed and mere verbal slander, as regards its actionable character, is

shown. The defendant published in a newspaper the following: "Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation and fraud in the Hurricane island vote, for which Davis Tillson is, without doubt, responsible as he was last year." The Supreme Court held that the publication was actionable without extrinsic evidence as to its precise import, and without any allegation of special damage. In respect to the supposed requirement that, in order to maintain an action for damages where no crime is imputed, special damage must be alleged and proved, a distinction has been long and uniformly maintained between mere words and written or printed slander. Holt's Law of Libel, First Am. Ed. 218–223. The cases, ancient and modern, where this distinction has been regarded, are numerous. Lord Holt says "scandelous matter is not necessary to make a libel. It is enough if the defendant induced an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." Cropp v. Tilney, 3 Salk. 226. To say of a man "he is a dishonest man," is not actionable without special damages alleged and proved, but to publish so, or to put it upon posts, is actionable. Austin v. Culpepper, Skin. 124. In Villars v. Monsley, 2 Wils. 403, the court say: "There is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable either way. For speaking the words 'rogue' and 'rascal' of any one, an action will not lie; but if those words were written and published of any one an action will lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another and publish them maliciously, as in the present case, no doubt but the action well lies." In another case, where the defendant had applied the epithet "villain" to the plaintiff, in a letter to a third person, and the plaintiff, though alleging, failed to prove any special damage, the court ordered judgment for the plaintiff, expressing the opinion that "any words written or published, throwing contumely on the party are actionable." Bell v. Stone, 1 Bos. & Pul. 331. In one of Christian's notes to Blackstone mention is made of a case where a young lady recovere £4,000 damages for reflection upon her chastity published in a newspaper, though she could not under English laws, without alleging special damage, such as loss of marriage, or the like, have maintained an action for verbal slander containing the grossest aspersions upon her honor. In Thornley v. Lord Kerry, 4 Taunt. 355, the words of the alleged libel as declared on were, "I pity the man (meaning the plaintiff) who can so far forget what is due to himself and others as, under the cloak of religion, to deal out envy, hatred, malice, uncharitableness and falsehood." Mansfield, Chief Justice of the Common Pleas, pronouncing judgment for the plaintiff in the Exchequer Chamber, at Easter Term, 1812, while he declared himself personally disposed to repudiate the distinction between written and unwritten scandal, says: "I do not now recapitulate the cases, but we can not, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if spoken." For later English cases maintaining the same doctrine, see McGregor v. Thwaites, 3 Barn & Cres. 24, E. C. L. R., vol. 10; Clements v. Chivis, 9 Barn. & Cres. 172, E. C. L. R. vol. 17; Woodward v. Dowsing, 2 Man. & R. 74, E. C. L. R. vol. 17; Shipley v. Todhunter, 7 Car. & P. 780, E. C. L. R. vol. 32, 690; Parmiter v. Coupland, 6 Mees. & W. 105. The American cases on this point follow in the same line with the English: Runkle v. Meyer, 3 Yeates, 510; McCorkle v. Birnes, 5 Binn. 354; McClurg v. Ross, id. 218; Dexter v. Spear, 4 Mass. 115; Dunn v. Winters, 2 Humph. 512; Clark v. Binney, 2 Pick. 113, 116; Stow v. Converse, 3 Conn. 325; Hillhouse v. Dunning, 6 id. 391; Shelton v. Nauce, 7 B. Monr. 128; Mayrant v. Richardson, 1 Nott & M. (S. C.) 210; Colby v. Reynalds, 6 Vt. 489. The subject is discussed with numerous references to cases, old and new, English and American, in a note to Steele v. Southwick, in 1 Hare & Wallace's American Leading Cases (5th ed.), 123.

THE death in Paris is announced of Baron Hubret de Seze, grandson of the advocate who defended Louis XVI. on his trial——The oldest judge upon the English Bench, Sir Fitzroy Kelly, completed his eighty-second year on the ninth of last October.

LAWS WHICH PERTAIN TO THE REMEDY AND DO NOT IMPAIR THE OBLIGATION OF CONTRACTS.

When the framers of the Federal Constitution adopted the clause inhibiting state legislatures from passing laws impairing the obligation of contracts, they could not conceive or clearly have foreseen the difficulties which such a clause would give rise to in the future, when the question presented itself as to what remedies a state legislature might abolish, change or add to without coming in conflict with the language of the clause. In some cases where questions as to whether a law impairs the obligation of contracts have arisen, the difficulties were not great, because the line between what was a law pertaining to the remedy could not fail to be clear. It was where a given law touched the so-called demarcation line between remedy and contract (as distinguished from remedy) that difficulty arose, and is now experienced.

The importance of having a formula which shall contain or express the principle distinguishing constitutional from unconstitutional provisions in this regard, has lead the writer to submit the views which follow.

The remedy is an essential part of every contract. Generally—and for all practical purposes—herein consists the sanction in consequence of which a given contract is performed, or through which it is enforced. That is to say, while perhaps one remedy rather than another may not be indispensable to a given obligation, some remedy is obviously required. Different contracts require distinct remedies; what may be effectual in one, may be entirely abortive in another case; what may not seriously impair or interfere with the obligation of one contract may do so decidedly as to another; what may pertain to the obligation rather than the means of the enforcement may be in one case clear, in another less clear, in another very obscure. The inference might, therefore, be indulged that each case is to be judged by its own circumstances, pretty much as each case of alleged fraud, is to be judged by the circumstances of the particular case. Of course, each case may be judged by its own circumstances; that is always true; but to say this is not to relieve the matter of its difficulties. Unlike fraud, some demarcation line is hereby required, and eventually must become indispensable.

To limit a state sovereignty in creating and changing remedies may result in serious detriment to the state; may result in a curtailment of its sovereign functions, which will very extensively dissipate the quality of sovereignty. Remedies being indispensable to contracts, and contracts making up the body of transactions within a given community, a curtailment of power in reference thereto, as the institutions of the country develop, may result in serious and lasting detriment to the community, and lead to an, at least partial, paralysis of the resources and institutions of the state, superinducing, if not eventual decay, insurmountable obstacles to the proper, healthy development of the state.

Certainly so serious a result may well warrant state tribunals in claiming some prerogative free from the overruling control of the Federal Supreme Court, interpretative of the clause of the Federal Constitution herein referred to, where the latter exceeds the reasonable and proper limits which a just and proper view should fix upon. And in time to come,—the time may not be far distant,—that they will assume such a prerogative for the protection of the state's integrity, as against the unconscious centralizing tendency swaying the Federal Courts, there would hardly seem to be a doubt, unless some reasonable demarcation line be adopted, which in principle shall recommend itself.

Before going further it may be well to remember that the contract is the *agreement* between parties, &c., of which, as an incident, the *obligation* is the resulting right on the one side and duty on the other, and that, another, the *remedy* is the means afforded for enforcing the duty, securing the rights, and of carrying out the contract. Now, while a remedy is required to give effect to contracts, it does not always enter into the consideration of parties making contracts, nor is it true that parties making contracts always have reference to any particular remedy. Hence, a given remedy may or may not enter into the consideration of the parties. Indeed, as a rule, it is not practicable to say more, in defining the power of a state legislature to change or create new remedies, than that where remedies exist state legislatures can not abolish the same entirely, so as to leave no remedy remaining. Some remedy there ought to be, and where

some exist all can not be abolished, for, to do so, takes away the sanction which constitutes an effective part of every contract. It may be laid down as a rule of invariable application, with reference to contracts, that the legislature of a state can not abolish all remedies.

We suppose, now, that the state legislature simply seeks to substitute one remedy for another. As to this power of substitution, the sovereign power of the state should not be restrained by construction without an obvious infringement; the presumption to be overcome, in considering enactments which contemplate substitution of one remedy for another, should be that of power possessed, unless there be an apparent, palpable infringement, either directly or by probable consequence. And where a remedy remains, though it be less effectual, if for all purposes the remedy will effectuate the obligation, that should be sufficient, for there would be no imparing of the obligation, except so far as one remedy may be more expeditious than another. In reference to mortgages, the proposition as to whether the legislature, by a given enactment, has tampered with the remedy, is one which should be determined without regard to the peculiar terms of any particular contract. If a means is left to effectuate the contract, without a substantial interference with the general obligation of the mortgage, that ought to be sufficient; when to take any other view might benefit the one at the expense of the many—something which the law usually does not recognize as being correct doctrine. Parties ought not to be heard to complain; they should take in subordination and with notice of the superior utility and economy of such a doctrine. As regards homesteads, sales under execution, &c., creditors generally have no vested right; the rights they have are simply a means of enforcement, a means the law has accorded to them. The good of the community should not be sacrificed to the probable good of a few creditors; the legislature, the sovereign power should not be limited in respect to a matter that may involve much doubt, detriment and evil, for the sake of certain *speculative*, so-called inchoate, rights which creditors may have, if a particular means of enforcement is left them. The above reasoning would seem to lead to the conclusion, with reference to a substitution of remedies, that the only doctrine which should be laid down, is that above stated, viz.: that a state legislature can not abolish all remedies, but that some remedy must remain.

Such a doctrine, it would seem, is far more sound, politic and rational than a doctrine such as some of the decisions make manifest; wherein the question of infraction is made to depend upon the notions of judges as to what is a too extensive exemption, or is made to depend upon the views which different courts may take of the superior or inferior effect of a given remedy. And it is better than a doctrine which will favor complainants, and forget the rights of defendants, when the substituted remedy affords more efficacious relief than before was possessed. An obligation in the last named class of cases is as much impaired as in the former, *if particular remedies are to be considered a part of the contract;* and it is plain that there is as much reason for saying that laws giving more efficacious relief do so in the one case as laws substituting remedies in the other. In fact, however, if special remedies do enter into given contracts—which is seldom the case—there should be no more power to curtail the sovereign power of the state thereby, than is allowed to parties in any case, by their contracts, to vary or adopt remedies inconsistent with the policy of the state.

An examination of the decisions of the courts bearing upon the subject-matter of this article will reveal much contradiction, obscurity and insufficient reasoning respecting this branch of law. The adoption of the doctrine above enunciated in the form of a rule, it would seem will bring about harmony, consistency and clearness among the decisions of courts, and carry out the principles which have been enunciated, and, for the most part, properly applied, in reference to state insolvent laws. * M. M. COHN.

* See II and III Articles on State Insolvent Laws by W. P. Wade, Esq., Nos. 15 and 16 Vol. 7, Cent. L. J.

Said an English judge during the examination of a bankrupt the other day: "Truth and honesty seem to have had very little to do with these transactions, except understood in a commercial sense. They are words which are written in some places, but which have no application whatever to commercial minds and transactions. Such things as these never could arise if men had not utterly lost all sense of what is true and what is honest. Truth and honesty are like some of those rich colors which we can not now produce."

REMOVAL OF CAUSES IN CRIMINAL CASES.

FINDLEY v. SATTERFIELD.

United States Circuit Court, Northern District of Georgia, September Term, 1877.

Before Hon. W. B. WOODS, Circuit Judge, and Hon. JOHN ERSKINE, District Judge.

1. CONSTITUTIONALITY OF STATUTE.—Section 643, Revised Statutes, in so far as it provides for the removal to the United States Circuit Court of prosecutions against federal revenue officers in the state courts, is a constitutional enactment.

2. THE PROVISIONS OF SAID SECTION apply to every case of a federal revenue officer indicted in a state court for an act done under color of the United States revenue laws, but charged to be in violation of the criminal law of the state, and are not restricted to cases where an attempt is made by a state legislature to nullity a law of the United States.

HABEAS CORPUS.

Findley, Gaston and Prater were indicted in the Superior Court of Lumpkin County, Georgia, for the offense of assault with intent to murder, charged to have been committed on one Thomas, and were arrested to answer the indictment. The facts of the assault, as they alleged, were that Findley, a deputy collector of the internal revenue of the United States, and his assistants, Gaston and Prater, were going to a small distillery that was running illicitly, for the purpose of seizing the still. Discovering their approach, the distillers and their friends, of whom Thomas was one, took the still and made off with it, and were pursued by the revenue party. Thomas aimed his gun at one of the pursuers, and seemed about to shoot, when one of the pursuers shot a pistol and wounded him, and on this shooting the indictment was founded.

Upon these facts the prisoners petitioned the Circuit Court of the United States for the Northern District of Georgia—the district in which Lumpkin county lies—for the removal of the prosecution into that court, and the writ of *habeas corpus cum causa* was duly issued under section 643 of the Revised Statutes of the United States, and was served on the Superior Court of Lumpkin County. The judge of that court disregarded it, and directed the sheriff to retain the accused in prison. The prisoners then petitioned the circuit court for the writ of *habeas corpus* directed to Satterfield, the sheriff, alleging that they were held in custody by him in violation of the law of the United States. The writ was issued and served. Satterfield produced the prisoners before the circuit court, and returned that he held them under the authority of the Superior Court of Lumpkin County, as above set forth.

A. T. Akerman, for petitioners; *R. N. Ely*, Attorney-General of Georgia, for respondent.

WOODS, J.:

The petitioners do not deny that it was lawful for the sheriff to arrest them, and to hold them until the writ of *habeas corpus cum causa* was served on the Superior Court of Lumpkin County. But they say that, under the laws of the United States, the effect of that writ, when served, was to remove the indictment, and with it the lawful custody of their persons from that court to this; and that, therefore, the holding of them since by the officer of that court, the sheriff, has been in violation of the law of the United States. On the other hand, the Attorney-General of Georgia, for the respondent, contends that the jurisdiction of Lumpkin Superior Court over the prosecution, and the attendant right of that court to hold the prisoners for trial, have not been displaced by the proceedings which have been had for removal, because, first, the act of Congress which is supposed to authorize those proceedings is not warranted by the Constitution of the United States; and second, that the act, even if constitutional, is not applicable to such cases as the present. He concedes that if the act is constitutional, and is applicable to this case, the custody of the prisoners belongs here, and the sheriff has no right to hold them.

The first question, then, for our consideration, is whether Congress has constitutional power to remove from the state courts into the United States Courts for trial there, criminal prosecutions under the state laws commenced in the state courts, against persons executing the revenue laws of the United States, for acts done under color of those laws, or on account of rights claimed by such persons under those laws, and to prohibit the state courts from proceeding further with such prosecutions after the prescribed steps for removal have been taken.

If a question of this kind can be settled by the practice of the government, and by the authority of eminent men, the answer must be in the affirmative. The history of the legislation in which Congress has undertaken to exercise this power has been brought to our notice. We find that the temporary act of February 4, 1815, approved by President Madison, (3 U. S. Statutes, 195) contained, in section 8, provisions similar to those of section 643 of the revised statutes. In January, 1833, President Jackson recommended that Congress should re-enact the law of 1815, with some amendments, and accordingly the act of March 3, 1833, was passed, (4 U. S. Statutes, 632), section 3 of which is repeated in section 643 of the revised statutes. This act was passed under circumstances which drew upon it the serious attention of the country, and caused its provisions to be thoroughly considered. The material part of the third section received its final shape from an amendment proposed in the Senate by that wise and learned jurist, Thomas Ewing, of Ohio. The test vote upon the bill in the Senate was thirty-two yeas to eight nays, and the vote in the House of Representatives was one hundred and twenty-six yeas to thirty-four nays. Among the yeas were John Quincy Adams, James K. Polk, John M. Clayton, George M. Dallas, Thomas Ewing, John Forsyth, Theodore Frelinghuysen, Felix Grundy, William C. Rives, Peleg Sprague, Daniel Webster, Hugh L. White, William Wilkins, John Bell, Edward Everett, Richard M. Johnson, and the name ever to be revered in this

court, of James M. Wayne, with others of scarcely less note, representing different parts of the country and different political parties. President Jackson approved the bill, his legal adviser at the time being Roger B. Taney. This act remained in force until superseded by the revised statutes in 1874. As it was held to apply only to the customs revenue, section 67 of the act of July 11, 1866, approved by President Johnson, extended its provisions to the internal revenue. 14 U. S. Statutes, 98.

We should not feel at liberty to pronounce unconstitutional a course of legislation so long continued, so deliberately maintained—sanctioned by so many venerated names and by the general approbation of the country, unless its unconstitutionality was made very clear to our minds; and, aside from this weight of authority, our reflections have brought us to the opinion that these statutes are fully warranted by the fundamental law.

The judicial power extends to all cases arising under the laws of the United States. It is argued that no criminal case can arise under those laws, except when a person is accused of violating them. But we think that, when an officer, executing in a lawful manner a law of the United States, meets with resistance, and, to overcome that resistance, uses necessary force, and, for such use of force, is charged with crime against the state, the case arises under the law of the United States. To hold that a case arises under that law, when it forbids the act under investigation, but does not arise under that law when it produces and justifies the act under investigation, is to take the words of the Constitution in a sense too partial and limited. Congress can give criminal jurisdiction to the courts of the United States, when the law of the United States is the ground of defense, as well as when it is the ground of accusation.

Congress has power to levy and collect taxes and excises, and to make all laws necessary and proper to carry that power into execution. This includes the power to employ suitable officers and agents, and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty. We can not say that this protection is not necessary and proper for the prompt and effective collection of the revenue. It is obvious that, where a local sentiment, adverse to a particular revenue law, could exert itself in irremovable prosecutions in the local courts against persons executing that law, the collection of the revenue might be seriously impeded. Congress has thought proper to guard against such impediments by the law that we are now considering, and we are satisfied that it is a constitutional means to a constitutional end.

We do not overlook the objection that no tribunals but those of the state can try for crime against the state. This objection does not appear to us well founded. To try, is to ascertain by a jury whether a criminal law of the state has been violated. In civil cases, Congress has directed the courts of the United States to apply the law of the state, and they do it daily. In the criminal cases under consideration, Congress has directed the circuit courts to apply the law of the state, and we do not see why they may not do it as well as in cases of the other class. To learn what is the criminal law of the state is no more difficult than to learn what is its civil law. Juries are, in the courts of the United States, composed of the citizens of the state, of the same qualifications as jurors in the state courts, and selected by similar rules. The courts of the United States ascertain facts by evidence substantially the same as that received in the state courts, and have the like aid of counsel for the prosecution and for the defense. In case of conviction, the accused could not decently object to a jurisdiction to which he had himself appealed. If any difficulty should arise in executing a sentence, Congress could provide against its recurrence by further legislation; but, until such a difficulty shall occur in practice, we need not apprehend one.

We would not suffer the right of removal to be abused. We shall enforce it only when it has been claimed in good faith and on good grounds. Should we discover, either before or during trial, that the facts of a case did not bring it within the act of Congress, we should proceed no further with it, and should remand it to the state court.

But suppose that the circuit court can not try such cases, it would not follow that Congress could not deliver the prisoners from the custody of the state court, and stay proceedings there. The power to do this is distinct from the power to give the courts of the United States a jurisdiction for trial.

A notable instance of the exercise of such a power by Congress is found in the act of August 29, 1842, 5 U. S. Statutes, 539, re-enacted in the Revised Statutes, section 762, empowering the judges of the United States to deliver, by the writ of *habeas corpus*, foreigners confined by the state courts for acts done under the authority of foreign powers. The confinement and trials of such prisoners by the state courts for such offenses was deemed by Congress incompatible with the international obligations of the United States, and accordingly provision was made for discharging them by *habeas corpus*. This act was drafted by Mr. Webster and was introduced and advocated in the Senate by Mr. Berrien, and though it did not escape criticism at the time, we believe that the intelligent minds of the country now approve of it.

If a prisoner can be delivered from the custody of the state courts by *habeas corpus*, in order that the government may be unembarrassed in its international duties, he can be similarly delivered when Congress so provides in order that the government may by unembarrassed in the collection of its revenue. If the law of the United States and the law of the state can not both be executed, the latter must give way. But in the case now before us, we think that the state law can be executed, though not by the state tribunals.

The present case falls within the letter of section 643. It is argued that this section applies only to cases of attempts by state legislatures to nullify a law of the United States. It is not so

limited in its terms. Indeed, the act of 1866 was passed when no such attempt existed or was apprehended. We therefore think that the law is applicable to this case.

It is therefore adjudged that the detention of the petitioners by the sheriff is in violation of the law of the United States, and it is ordered that the Marshall hold them in custody, subject to the further order of this court, for trial under the indictment found against them by the Superior Court of Lumpkin County.

ERSKINE, District Judge, concurred.

DEED OF CONVEYANCE—EFFECT OF SURRENDER OF DEFEASANCE.

WILSON v. CARPENTER.

Supreme Court of Indiana, May Term, 1878.

[Filed September 25, 1878.]

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS, } Associate Justices.

1. PLEADING—ANSWER—COUNTERCLAIM.—A single pleading will not be allowed to perform the double office of an answer and a counterclaim.

2. ABSOLUTE DEED WITH DEFEASANCE — EFFECT OF CANCELLING THE LATTER.—Where a deed absolute on its face is executed, and at the same time the grantee executes to the grantor a defeasance, if, subsequently, upon a new and valid consideration between the parties, the grantor voluntarily surrenders to the grantee such defeasance for cancellation, the title of the grantee is thereby rendered absolute and discharged of all conditions.

The facts sufficiently appear in the opinion of the court.

NIBLACK, C. J., delivered the opinion of the court:

This was a proceeding by appellant against appellee, to enforce the specific performance of a contract concerning real estate. The complaint was in two paragraphs.

The first paragraph alleged that, on the 6th day of January, 1874, the appellant was the owner of several tracts of land, in Shelby county, Indiana, amounting in the aggregate to 214 acres, and, being desirous of obtaining loans of money, from time to time, to carry on his business, agreed with the appellee that, in consideration of the latter's undertaking and promising to endorse for him from time to time, as appellant might require and desire, not to exceed in the aggregate, at any one time, the sum of $3,000, he would convey to the appellee said several tracts of land, to indemnify and save him harmless on account of said contemplated indorsements. That in pursuance of such agreement, appellant did on that day convey said tracts of land to appellee, by a good and sufficient deed of conveyance. That at the same time appellee executed and delivered to appellant his agreement in writing, known as a defeasance, binding himself to reconvey said lands to appellant on being indemnified and saved harmless on account of any liability as endorser under said agreement between the parties. That on the 1st day of March, 1875, appellant and appellee had a full and final accounting of all matters of indebtedness between them, including indorsements by appellee for appellant, and that, upon such accounting, nothing was found to be due from appellant to appellee. That appellant then notified appellee that he was released from all former indorsements, and that he would thereafter not be required to make any further indorsements for him. That appellant thereupon demanded of appellee a re-conveyance of said lands in accordance with the terms of their said agreement. That on the 15th day of March, 1875, appellant tendered to appellee a deed in proper form already prepared for his signature, re-conveying said lands to appellant, but appellee refused to execute said deed, or to re-convey said lands in any other manner whatever.

The second paragraph was similar to the first, except that it charged a failure to and refusal on the part of the appellee to indorse for appellant, as stipulated between the parties, and a demand for a re-conveyance on that account.

The prayer of the complaint was that the deed from appellant to appellee should be set aside and a re-conveyance of the land decreed.

The appellee answered in two paragraphs. The first paragraph set out the execution of the deed to the appellee, and the defeasance to the appellant very much as stated in the complaint, and avers that, on the 13th day of Seprember, 1865, appellant executed to appellee his note for $4,000, due ten years after date, together with a mortgage on the lands described in the complaint, to secure the payment of said note. That after the execution of said deed and defeasance, appellant became indebted to appellee in divers other sums of money, giving a detailed statement of them, amounting to the aggregate sum of $10,408. That on the 1st day of March, 1875, on a full settlement of all mutual dealings and demands, it was agreed that appellee should release appellant from said last named mortgage debt, and all other claims and demands whatsoever, and that appellant should surrender to appellee the above named defeasance for cancellation, and as null and void, and that appellee should thereafter hold the lands therein referred to absolutely in fee simple, and discharged of all the conditions and qualifications imposed by and contained in said defeasance. That in pursuance of such agreement, appellant delivered up to and surrendered the said defeasance as cancelled and extinguished, and thereupon appellee released to appellant all claims and demands of any kind, and executed to him a receipt in full therefor. That thereby the said defeasance was fully executed and discharged, and the appellee became the owner in fee simple and absolutely of the lands described in the complaint; concluding

with a prayer that the appellee should be adjudged and decreed the owner of said lands, free from all right, title interest and equity of redemption of appellant.

The second paragraph was in general denial of the complaint.

A demurrer to the first paragraph of the answer was overruled and a reply in denial filed. A trial resulted in a general verdict for the appellee, accompanied by some answers to interrogatories, which were not inconsistent with it, and a judgment followed, amongst other things decreeing that the appellee should hold, possess and enjoy the lands in controversy free and discharged of all right, title and equity of redemption of appellant.

A good many questions were reserved in the evidence and on the instructions of the court, which were brought to the attention of the court in proper form by a motion for a new trial.

The first question for us to consider here in its natural order, is the sufficiency of the first paragraph of appellee's answer. That paragraph is somewhat informal in its construction, as it purports on its face to be both an answer and a counterclaim—a double office which this court has decided that a single pleading cannot perform. Campbell v. Routt, 42 Ind. 410. As an answer, it sets up affirmative matter inconsistent with the allegations of the complaint and avers the entering into a new agreement upon a sufficient consideration, which constituted a good defence to appellant's claim for a specific performance of the original contract between the parties. Story's Equity, vol. 1, sec. 770; 1 Greenl. on Ev., Secs. 302, 304; Browne on the Statute of Frauds, Secs. 409, 429, 430, 433 and 434, Arnoux v. Homans, 25 How, P. R. 427; Billingsley v. Stratton, 11 Ind. 396: Baldwin v. Salter, 8 Paige Chy. 472. Considered therefore as an answer merely, it was sufficient on demurrer.

Upon the trial, however, it was treated principally, if not entirely, as a counterclaim and it was evidently on that theory that a judgment was rendered in favor of the appellee as above recited. It is consequently as a counterclaim that we have mainly to consider it here. Its sufficiency as a counterclaim, as well as an answer, has been very ably discussed by both parties and their very elaborate citation of authorities bearing upon the points at issue between them has greatly assisted us in coming to a conclusion upon the legal questions involved in the discussion.

It is very earnestly contended by the appellant that the alleged surrender and concellation of the defeasance set up in the paragraph under consideration did not in any manner divest the original contract between the parties of its mortgage character and hence constituted no defence to his complaint and that, for still stronger reasons, such surrender and concellation did not make out a case for the affirmative relief demanded in that paragraph. Many of the authorities cited by him lay down abstract rules which would seem to support the positions thus assumed.

But the appellee insists that the surrender and concellation of the defeasance averred by him, constituted a new and binding contract between the parties which superseded the original agreement and which practically converted the deed from the appellant to him into an absolute conveyance in fee simple.

That the deed and defeasance, taken together, constituted only a mortgage from appellant to appellee, is a proposition too well established to require the citation of authorities to sustain it. As to that, there is no controversy between the parties here. But what effect, if any, did the surrender of the defeasance for cancellation have on the original agreement between the parties, conceding it to have been surrendered in the manner and under the circumstances alleged by the appellee?

In Washburn on Real Property, vol. 2, p. 62, 4th ed., it is said: "The doctrine universally applicable is, if once a mortgage, always a mortgage. Nor can it be made otherwise by any agreement of the parties made at the time of the execution of the deed, nor upon any consideration whatever. Equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan.

"This does not preclude any subsequent *bona fide* agreement in respect to the estate, between the parties; and where a mortgagor voluntarily cancelled the instrument of defeasance which he held, it gave to the deed which it was intended to defeat the effect of an original, absolute conveyance as between the parties."

In the case of Ramsen v. Hay, 2 Edw. Chy. 534, it is also said: "There is nothing in the policy of the law to prevent a mortgagee from acquiring an absolute ownership by purchase from the mortgagor at any time subsequent to the taking of a mortgage, and by a fresh contract to be made between them. Courts view with jealousy and suspicion any dealings between the mortgagor and mortgagee to extinguish the equity of redemption; but, if it be fair and honest on the part of the mortgagee, the purchase will not be disturbed. The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage deed of some covenant or agreement forming part of the same transaction with the loan, and the taking of the security, by which he shall attempt, upon the happening of some future event or contingency, to render the estate irredeemable and obtain an absolute ownership. In such cases the maxim applies of 'once a mortgagee, always a mortgagee.' Henry v. Davis, 7 Johns. Chy. 40; Clarke v. Henry, 2 Cowen, 332. But it can not interfere with the right to foreclose when the mortgage has become forfeited, nor with any fresh contract which the mortgagor may choose to make with the mortgagee for a sale or relinquishment of the equity of redemption, and vesting the latter with an irredeemable estate."

In Hilliard on Real Property, vol. 1, page 546, 4th ed., it is also said: "Where a deed is given, accompanied by a defeasance which is not recorded, a subsequent surrender and cancelling of such defeasance by agreement, for the purpose of giving the grantee an absolute title, without un-

fairness between the parties, or as to strangers, and before any rights of creditors have intervened, will vest the absolute title in the grantee.

The same doctrine is also recognized in Hilliard on Mortgages, vol. 1, 4th ed., page 84, sec. 18. There are numerous reported cases to the same effect. See West v. Reed, 55 Ill. 242; Falis v. C. M. F. Ins. Co., 7 Allen, 46; Rice v. Bird, 4 Pick 350; Trull v. Skinner, 17 Pick. 213; Green v. Butler, 26 Cal. 595; Harrison v. Trustees, 12 Mass. 456; Marshall v. Stewart, 17 Ohio. 356; Venmun v. Babcock, 13 Iowa, 194.

After a careful review of the foregoing authorities, and many others which we deem it unnecessary to specifically refer to here, we are of the opinion that the surrender of the defeasance for cancellation, under the circumstances as alleged, vested an absolute title to and ownership in the lands in suit.

The paragraph of the answer we are discussing is not formally and technically pleaded as a counterclaim, and does not, in precise terms, ask for a recovery of the possession of the lands in dispute, or for a quieting of the appellee's title to those lands, but we think it alleges substantial facts sufficient to entitle the appellee to some kind of affirmative relief under it, and that it was properly held good upon demurrer.

[The judgment was, however, reversed for errors committed by the court in its charges to the jury, and which raised different questions from those above considered.]

FIRE INSURANCE—AGENT—VOID CONDITION—WARRANTIES—ESTOPPEL.

PLANTERS INSURANCE CO. v. MYERS.

Supreme Court of Mississippi, October Term, 1877.

Hon. H. F. SIMRALL, Chief Justice.
" J. A. P. CAMPBELL, } Associate Justices.
" H. H. CHALMERS, }

1. AGENT PROCURING INSURANCE—VOID CONDITION IN POLICY,—A condition in a policy of insurance which, in effect, declares that in everything relating to the effecting of the insurance, the agent who procures it shall be deemed the agent of the insured and not of the insurer, involves a legal contradiction and is void.

2. STATEMENTS IN AN APPLICATION FOR INSURANCE are ordinarily representations merely, unless converted into warranties by a refereuce to them in the policy and a manifest purpose that the whole shall form an entire contract. And a warranty in an application may be limited by the conditions in the policy.

3. APPLICATION— ANSWERS WRITTEN BY AGENT —ESTOPPEL.—Where, in the preparation of an application for insurance, answers are given by the assured to the interrogatives of the agent of the insurers, and the latter writes down or dictates an erroneous deduction or result, he assumes for his principals that it is true, or that it is the equivalent of the verbal disclosure. And in such a case a court of law, borrowing from equity the doctrine of estoppel *in pais*, estops the insurers to insist on a breach of the warranty, or untruth of the representation, but permits the insured to prove the truth of such disclosure—the rule excluding parol proof to vary or contradict a written instrument not being applicable.

4. MATERIAL FACTS MUST BE DISCLOSED BY THE ASSURED.—It is the duty of an applicant for insurance to make disclosures to the insurers of all facts material to the risk; and this duty is the same whether required by the charter of the insurers or not. The insurers are entitled to know the whole truth, and the withholding of any material fact is tantamount to a false representation, and will be visited with the same penalty.

5. OVER-VALUATION OF PROPERTY.—Every overvaluation of property for insurance will not avoid the contract of insurance. If the assured, in good faith, puts a value upon the property greatly in excess of its cash value in the market, believing it to be worth the valuation put upon it, and not intending to mislead or defraud the insurance company, then such overvaluation will not defeat a recovery on the policy. To render void a contract of insurance for over-valuation there must be some element of fraud or intention to deceive, with a view to obtain insurance on the property for a greater amount than could otherwise be obtained,

6. NOTICE, OR WAIVER OF NOTICE, OF OTHER INSURANCE.—Where an applicant for insurance on certain property gives notice, in his application, that he has applied to another company for insurance to a specified extent upon the same property, and the insurers last applied to, on the face of the policy issued by them, consent that such a policy "concurrent" as the assured had already applied for might be underwritten, that is a sufficient notice, or waiver of further notice, of the issuance of the policy first applied for.

7. WARRANTIES—HOW LIMITED.—A warranty in a contract of insurance, as to the condition, situation, risk and value of the property which is the subject of the insurance, can not be extended to any property, or any matters, not specified in such warranty.

ERROR to the Circuit Court of Hind County.

W. L. Nugent, for plaintiff in error; *Harris & George*, for defendant in error.

SIMRALL, C. J., delivered the opinion of the court:

Wilson, the local agent of the Planters' Insurance Company, in Boliver county, solicited and procured Myers to effect the insurance in question in that company. He had been regularly appointed in writing. His general duties were to solicit and procure customers, take applications for policies, collect the premiums, and forward both to the principal office at Jackson, and give binding receipts for insurance for fifteen days. To facilitate him in the business, he was furnished with printed blanks of applications, to be filled up under his supervision, which were intended to inform the company of all circumstances material to the risk. It must be assumed that Wilson was selected on account of his supposed fitness for the employment. But he was also furnished with printed instructions respecting his duties. He was directed to publish the company as widely as possible, to canvass diligently for customers, to study carefully "the blanks and instructions, so that he would be able at once to *make out* and understand each form

of application correctly." In another place he is assured that "a thorough study of the instructions and blanks will enable him to answer any question understandingly, as to the company's manner of doing business," "and he will be able to fill out the blanks rapidly and correctly." He must inform applicants that the concealment of any material facts renders the policy void. In his deposition Wilson gave an interpretation of what he conceived to be his duty, which accords with the instructions, to wit.: "It is my invariable rule to interrogate the applicant, and, upon his replies, if necessary, I instruct him how to frame his answers."

The defendant below, the insurance company, contested the plaintiff's right to recover, on the ground that untrue answers were given by Myers to the questions propounded in his application for insurance. To that the insured replied that there are no misrepresentations or concealments, but the answers are true, whether they shall be regarded as warranties, or representations of the facts pertaining to the condition, situation of the property, the incumbrances upon it, value, etc. And, however that may be, they were fully disclosed to Wilson and known to him, and therefore the company are precluded from setting up that defense. To that the company rejoins that the insured covenanted with them that, as to all such matters, Wilson should be his agent, and not the agent of the company.

The questions arise on the covenant in the application "that the foregoing, with the diagram thereon, is a full and true description and warranty of the conditions, situation, risk, and value of the property on which the insurance is applied for; and which shall form the basis of this policy. * * * And I, the applicant, do hereby further agree that the policy of which this application is the basis, and which will be issued thereon, shall be accepted by me, with the express understanding that, if the note or notes given for the premium * * * shall be unpaid at the time of any loss, the policy shall be considered null and void." And, also, the fourteenth condition printed on the back of the policy, to wit: "It is part of this contract that any person other than the *assured*, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured, * * * and not of this company, under any circumstances whatever, in any transaction relation to this insurance."

The verbiage of this condition is not candid; it seems to have been used with studied design to obscure the real purpose. It is a snare set in an obscure place, well calculated to escape notice. It is not written or printed on the face of the policy. It is not so much as alluded to in the application; nor is the agent, in his printed instructions, enjoined to inform those with whom he treats of it. The average man of the community, the layman, interested in such a policy, after carefully reading it over, may well be supposed to hold this soliloquy: "What does this mean? Who is the other person referred to, who might have helped to procure the insurance? I called in no friend to aid me with advice. No one was engaged about it, except the agent and myself. Surely the allusion can't be to him, for he acted for and represented the company. If he were meant, the language would have pointed unmistakably to him." The covert meaning is that Wilson (and all others in his position), in anything done or said by him in procuring the insurance, "shall not in any circumstances whatever, or in any transaction relating to the insurance," be the agent of the company, but the agent of the assured.

Wilson was constituted agent for the company. The charter expressly authorized the Planters' Insurance Company to appoint agents and define their duties. Acts 1874, p. 138. There is no pretense that Wilson ever surrendered his trust, or that the power was ever revoked. If he could by stipulation be converted into an agent for the assured, he must be held as also the agent of the company; for in that capacity he professed to deal with Myers. It would be difficult for him to represent both parties as agent, touching the same subject-matter. Ostensibly he acted for the company in soliciting risks to be taken by it, in receiving and transmitting premiums, and in delivering policies. He was supplied with the requisite forms, and, in effect, was instructed to aid applicants to fill them up. On well-settled principles, he was competent to bind his principal within the legitimate range of his employment. He appeared before the public as their trusted and accredited attorney in fact. It is fair to presume that he had their confidence, and that they indorsed his skill and qualifications. Surely credulity can not be imputed to the public if they accepted and treated with Wilson as the representative of the company within the pale of his employment, and believed (unless his authority was restricted) that he could well do all things within the line of his duties which the company themselves could do. If his powers were restricted within narrower limits than the nature of his business would indicate, it was incumbent on the company to give notice to those who negotiated with him. Therefore, the propriety of the enunciation in Insurance Company v. Mahone, 21 Wall. 156: "That the acts and declarations of the agent are to be considered as the acts and declarations of the insurer, and the applicant was justified in so understanding them." Why justified in that conclusion? Because he purported so to act, and was held out to the public in that character by his principal; and the assured had no knowledge of private restrictions, if there were any. It is the suggestion of morality and reason that parties should deal with each other in the characters which they assume.

The fourteenth condition under review is extraordinary; whilst holding on to Wilson as the company's agent, it exacts a covenant from the assured that in all things concerning procuring the insurance, and in all circumstances relating to the insurance, he is the agent of the assured. The object is, plainly, to relieve the company from all responsibility for the acts and declarations of their agent, and to make the assured take the risk of his errors and mistakes. We do not say that the company could not restrict the apparent and ostensi-

ble authority of its agents. It might be altogether fair and reasonable to write or print in the applications, with which the agents were supplied, a notice that the company, in taking risks, would be governed exclusively by the surveys and answers to the written interrogatories, and not by any verbal answers given to the agents, or information imparted to him, unless *written in the application*. That would give notice to customers that the consequences of erroneous answers, or concealments of matters material to the risk, not disclosed in the written application, rested on them, and on them alone. In such circumstances, ordinarily prudent men would seek the advice and assistance of those who were skilled in such matters.

Counsel for the respective parties have directed much of their arguments to the questions whether the statements of Myers, as to the condition, situation, title, and incumbrance, are warranties or representations.

A warranty extends to every matter which it embraces, whether material to the risk or not; and the assured commits himself to their literal truth. Representations do not effect the contract if not willful, or if not material. They are collateral to the contract; and it will suffice if they are equitably or substantially complied with. It is sometimes difficult to determine whether the statements of the assured belong to the one class or the other. When they appear on the face of the policy, they do not necessarily become warranties. Their character must be gathered from the form of the expression, the purpose of the insertion, and by their relation to other parts of the instrument. It is an established maxim that warranties will not be created, or extended, by construction. Daniels v. Insurance Co., 12 Cush. 416; Miller's Case, 31 Iowa, 226; Forbish's Case, 4 Gray. 337, 340. Ordinarily, statements in the applications are representations, unless converted into warranties because of a reference to them in the policy, and a clear, manifest purpose that the whole shall form one entire contract. If the reference to the application is for another purpose, or no purpose is indicated to make it part of the policy, it will be so treated. Campbell's Case, 98 Mass. 391; Snyder's Case, 13 Wend. 92.

Following the description of the property are these words: "For a more particular description, and as forming a part of this policy, by which the assured is to be bound, special reference being had to the assured's application and survey," In an anterior part of the policy, is the declaration that the property is insured "subject to the conditions and stipulations indorsed thereon, which constitute the basis of this insurance." One of the stipulations referred to, and printed on the back of the policy is as follows: "1st, that the basis of this contract is the application; * * * and if such application does not truly describe the property, this policy shall be null and void. And any false statements or representations of facts material to the risk shall be deemed fraudulent, and be an absolute voidance of the policy."

The application does, undoubtedly, contain a warranty, and is imported into the contract. But the policy qualifies the stipulation in the application, within much narrower limits. The condition alluded to in the body of the policy is to this effect: that the policy shall be voided if the assured has not correctly described the property, and if he has made any false statements or misrepresentations in the application, of facts material to the risk. In the face of the policy, the insurers declare, in substance, that they assume the risk subject to this and the other conditions indorsed thereon, "which constitute the basis of the contract." When we come to look closely at what that basis is, we find it to be that the statements are representations of facts material to the risk. The falsity of any fact, however trivial and unimportant, the subject of a warranty, avoids the contract. But the underwriter assumes the risk, not on the warranty of the assured that his statements are absolutely and literally true, but on the faith that his statements and representations are true in all respects material to the risk. To avoid the policy the statements must be not only untrue, but such untruth must be predicated of a fact or facts *material* to the risk. If it be about a immaterial matter. no such consequence would follow. A provision that the statements are to be regarded as warranties is controlled by a subsequent recital that the assured is responsible for their truth, so far as they are material to the risk. So, if the *covenant* is that the statements are true as to "condition, value, risk," etc., but as to all other matters representations merely. Lindsay v. N. M. Ins. Co., 3 R. I. 157; May on Ins. 166, sec. 160.

This case is very much like one recently before Lord Cockburn, Fowkes v. Manchester & London Ins. Co., largely quoted in May on Insurance, section 168, wherein the Queen's Bench held that, construing the declaration of the assured and the policy together, the fair import of the contract was "that the assured agreed that his answers to the questions propounded by the company shall be the basis of the contract between them—that is to say, if he was guilty of any fraudulent concealment or designedly untrue statement in these answers, the policy shall be null and void," etc. So in this case; the first condition refers to the application, and declares if the assured has made "any false statements or misrepresentations." Elliott v. Mutual Ins. Co., 13 Gray, 139, is, perhaps, more in point. Here, the words "misrepresentations or suppression of material facts" were held to control other expressions in the instrument, and to so far control them as to make it clear that the assured did not warrant. We think in this case that Myers is bound by his statement, as representations, and not as warranties. But whether the one or the other, is not material in the view we have taken of the questions contested.

There are two lines of decisions in the books, which pursue divergent lines. The one holds that parol testimony is inadmissible to show the participation of the agent in the preparation of the application—as, that correct responses were made to the interrogatories, but, on the suggestion of the agent, an incorrect result of such responses was written down by the agent, or the applicant at his

dictation. These decisions rest on the idea that the object and effect of the testimony is to vary or contradict the written contract. Such were the earlier cases in New York and many other states. That doctrine is still adhered to in Massachusetts, Rhode Island and Virginia, and perhaps in some other states. The other class, of later origin, rapidly increasing in numbers and favor, declares that insurance companies constituting local agents to canvass for business, take and forward applications, collect premiums, and give binding contracts of insurance for fifteen days pending applications, (such agents as Wilson), must be held responsible for the acts and declarations of the agents, within the scope of the employment, as if they proceeded from the principal,

The general rule, settled by many authorities, is that the insurers can not take advantage of the omission or mis-statement of any fact which it was their duty to state correctly; and this is true when the defect occurs in the application for insurance, prepared by themselves, or any one by them authorized, with a knowledge of all the facts. Bonley v. Insurance Co., 36 N. Y. 550; Peck's Case, 22 Conn. 575; Bebee's Case, 25 Conn. 51; Franklin's Case, 42 Mo 457; Beal's Case, 16 Wis. 241. In Malleable Iron Works v. Insurance Company, 25 Conn. 465, the court said of an agent (equipped for business as was Wilson), that he had an implied power to explain the questions and the answers required, and that his error or omission could not be given in evidence as a breach of warranty by his principals. Beal's Case, 16 Wis. 241; Plumb's Case, 18 N. Y. 392; Rowley's Case, 36 N. Y. 550; Moleer's Case, 5 Rawle, 342; Ayer's Case, 21 Iowa. In the American Leading Cases, the annotation to Carpenter's case, after a collation and review of the authorities, states this result: "Where the business of the agent is to solicit for his principal, and procure customers, and he misleads the insured by a false or erroneous statement of what the application should contain, or, taking the preparation into his own hands, procures his signature by an assurance that it is properly drawn, the description of the risk, though nominally from the insured, *ought to be regarded as proceeding from the company.*" May's Case, 25 Wis. 306; Schelliler's Case, 38 Ill. 166; Wilkinson's Case, 13 Wall. 236; Insurance Co. v. Mahone, 21 Wall. If the insurers assume the preparation of the contract, they can not take advantage of the failure of the instrument to express any fact or circumstance that has been duly communicated by the insured, and omitted by negligence, mistake or design by their officers or agents. The principle equally applies when the error or misdescription is in the application, if it was prepared or dictated by the agent. Beal's Case, 16 Wis. 241. These cases, and others that might be cited, deny the *applicability* of the rule excluding parol testimony which varies or contradicts a written instrument, and place its competency on another ground, namely, "where one party has, by his representations or conduct, induced the other party to the transaction to give him an advantage which it would be against equity and good conscience for him to assert, he will not be permitted, in a court of justice, to avail himself of that advantage." The courts apply the doctrine of equitable estoppel, so beneficial and just when properly used.

It would seem that, strictly, the more appropriate remedy would be a suit in chancery to reform the contract. Those courts that reject the parol evidence, in the great majority of cases, would relieve in that mode. But, as we have seen, the tendency is to attain the same result at law, by allowing the truth to be proved by parol, and giving to it the force of an estoppel *in pais*. Whether the disclosures of the assured are made warranties or representations is immaterial. The testimony shows what answers were given to the interrogatories to the agent. They bring to his notice the actual facts. If the agent writes down or dictates an erroneous deduction or result, he assumes for his principal that it is true, or that it is the equivalent of the verbal disclosure. The assured would be regarded as declaring to the insurer: "If the answer, as written, is your understanding of the facts disclosed to your agent, then I am bound by them as 'warranties,' or as representations, as the case may be." Mahone's Case, 21 Wall.

If this were a suit in chancery for reformation of the contract, that court would esteem the verbal statements of Myers, in answer to the interrogatories, as incorporated into the contract, and decree accordingly, if there were no other objections. A court of law would reach precisely the same end, by putting the insurer under an estoppel to insist on a breach of the warranty, or the untruth of the representation. It is but another addition to the numerous instances where courts of law have borrowed principles from the equity courts, and adopted and enforced them. Nor should any limitation be put upon the naturalization into the common law of equitable principles, when its methods of procedure and forms of action are adapted to render complete justice.

In Chase v. Insurance Company, 20 N. Y. 54, there was a stipulation in the application (which we have before characterized as reasonable); it was, "that the company would not be bound by any act done, or statement *made*, to or by any agent or other person, *not contained in the application.*" In the later case of Rohback, 62 N. Y. (1875), literally the same covenant as in the case before us was sustained. It had been condemned by the Supreme Court of New York.

Its inevitable effect is to greatly weaken the indemnity on which the assured rely. It is inconsistent with the acts and conduct of the insurance companies in sending abroad all over the land *their agents* and *representatives* to canvass for risks. It is an effort by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them, and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation or restriction of power, but the dissolution of the relationship with themselves, and the establishment of it between other parties.

This fourteenth condition attempts a logical and

legal impossibility. It converts the agent of one into the agent of both. He deals with the subject-matter for both contracting parties. He is instructed by the company to study his documents and papers, so that he can "readily fill up the blanks;" he can negotiate for the company for high rates of insurance, and at the same time his duty to his other principals is to cheapen the rates. It places the agent in an inconsistent and antagonistic position. On the one hand, he must ply the people to insure, extend and increase the business and the profits of the company, and thereby put money in his own purse. But, in doing all this, if he blunders and makes mistakes for these, he is the agent of his customers, and with them is the responsibility. If he waives a forfeiture by extending the time for the payment of a premium note, it would be a grave question whether he represented the company or the assured. If the latter, there would be no waiver at all. The complications would be intricate, and almost inexplicable.

Whilst we can not sustain this condition, we repeat that it is entirely legitimate for this corporation to limit the powers of its local agents. But if they choose to do so, those with whom they do business ought to be informed of it. We adopt the doctrine of those cases which hold that, if the agent takes charge of the preparation of the application, or suggests or advises what shall be answered, or what will be a sufficient answer, the company shall not avoid the policy because they are false or untrue, if full disclosures were made by the applicant to him.

We come now to consider whether there are any false representations or concealments that should avoid the policy. The underwriter was entitled to full disclosures, not merely to know the truth, but the whole truth—a withholding of any facts material to the risk is tantamount to a false representation, and visited with the same penalty.

No serious objection is made to the answer to the interrogatory about the title.

It is said, with great force of reason, that the response to the inquiry about incumbrances lacks fullness, and does not accord with the truth. It was very material to the company to know the extent of the assured's interest in the property, and its value. If he had only an equity of redemption, how much was it worth? The fact was that the incumbrance was for a principal debt of $40,000, with large arrears of interest. It was in litigation, and there had been a decree of the chancery court reducing the apparent debt to $10,000, which had been appealed from, and was undecided in the supreme court. These circumstances were important, both in determining whether the risk would be taken and in fixing the rate of insurance.

It is also objected that the answers to the question as to the value of the plantation, and the gin-house, gin-stands, press, etc., and appurtenances, are untrue in this: that the valuation is excessive. Every overvaluation will not avoid the contract. There must be some element of fraud, or intention to deceive with a view to obtain insurance thereon for a greater sum than could otherwise be obtained. The rule approved by the Supreme Court in Franklin Insurance Co. v. Vaughan, 92 U. S. 519, is that if the assured put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such overvaluation will not defeat a recovery on the policy. In that case the "goods" were valued in the application at $12,000; the actual worth, as found by the jury, was $7,804 Yet, there being no fraud meditated, or intention to mislead, the contract was not avoided.

The Planters' Insurance Company gave notice in the blank application, and also stipulated in the policy, that they would only pay, if a loss occurred, two-thirds of the value of the property at the time of the loss—thereby giving themselves a wide margin of safety, and not trusting to the accuracy of valuations. At best, the value of real estate and structures thereon is uncertain. It is a matter very much of opinion, about which there will be great difference. Myers was asked his *opinion*, and if it was in excess of others, he should not suffer by it, if he meant no fraud or deceit.

The answers to the questions, six, twelve and fifteen, in relation to the title, the value of the plantation, and the incumbrance, relied upon by the insurance company to defeat a recovery, were given under these circumstances: Wilson, the agent, states that, at the time the application was filled up, and several years prior thereto, he was intimately acquainted with the Belmont plantation, and gin-house, and appurtenances; that he had specially examined the latter twice, and made two surveys, for the inspection of insurance companies; and that his invariable custom was (followed in this case) to explain the interrogatories in the printed blanks, and instruct the applicant how to make his answers; that he knew that Myers owned two-thirds of the Belmont plantation, upon which the deed of trust in favor of Estill operated to secure a principal debt of $40,000; that he was trustee, and a party to the suit which resulted in the chancery court decreeing a balance in favor of Estill of $10,000, which was pending on appeal in the supreme court, and undecided. With all this knowledge, Wilson states: "Knowing the proper answer to be made to question six, I did instruct Myers how to write down his answer. Of course I approved the same."

He gives substantially this account of the answer to the twelfth interrogatory: A good deal of conversation occurred between Myers and himself as to the proper answer. The property produced $5,000 income, which would be ten per cent. on a value of $50,000. It was finally settled to give that valuation; and then added that although that might be more than the property would bring in the market, for cash down, "yet it so greatly exceeded the amount of the lien or decree that it was not a matter of importance as to the exact value." "He did not consider the valuation excessive." His explanation about the answer to the sixteenth question is to the effect that, knowing all about the matter inquired about, both Myers

and himself knew that the incumbrance was $10,000, or thereabouts. Myers, in his deposition, states that he referred the question of the value of the plantation to Wilson, who, after discussion with him, concluded that the property fairly represented a cash capital of $50,000, "and could fairly be put down at that price." Wilson also agreed that the answer to the sixth interrogatory should be as written. Wilson, who was familiar with the deed in trust for Estill's benefit to himself as trustee, the litigation, and the decree therein, agreed with Myers, after consultation, that the answer to the sixteenth question should be as written in the application. Myers further says that he consulted Wilson on all the points of difficulty.

Not to pursue the subject into further detail, it has been clearly proven that Wilson actively participated in the preparation of the application, dictated the most material answers complained of as erroneous, and approved and consented to all of them as statements of the truth, especially within the rule laid down in Insurance Company v. Mahone, 21 Wall., and the other cases hereinbefore cited. The company is estopped to deny the truth of the answers in the application, and cannot make the defense that the statements of the assured therein are misrepresentations, so as to avoid the policy.

Myers, in his application, gave notice that his factors had applied for insurance, to the extent of $4,500, in other companies. In the face of the policy the insurers consented that such a policy "concurrent" might be underwritten. That was sufficient notice, or waiver of further notice. The company does not insist, in this court, on the point that the policy has been forfeited for nonpayment of the premium.

The 6th section of the charter (Acts 1874, p. 238) does no more than require the applicant to state "all the material facts and circumstances concerning the risk required by the company." But it does not prohibit the parties to the contract from making warranties if they choose. It is not restrictive of the power of the corporation, but declaratory of the duty of the assured. Independent of this section, it would have been the duty of the assured to have made full and truthful disclosures. The provision is for the benefit of the company, and was not designated to circumscribe its power.

There is great force in the argument of the counsel for defendant in error that the first warranty clause of the application extends no further and embraces no more, than the "condition, situation, risk, and value," etc., of the property on which insurance is applied for, which property was the house, gin-stands, press, etc.; and, on familiar principles, all else not included in the enumeration is excluded. The very point was ruled in Insurance Company v. Cornick, 24 Ill. 461. But, as hereinbefore said, construing all the instruments together, the application and the policy, as constituting the contract, the intent and purpose is reasonably clear that the risk was assumed on the faith that the property had been correctly described, and that no misrepresentations had been made of facts material to the risk; and that, although there was the warranty, above referred to, in the application, that was qualified by the stipulations in the policy, which was made to depend for its validity on the statements of the application as "representations," and not as warranties.

JUDGMENT AFFIRMED.

CHALMERS, J., concurring.

It is said in the opinion of this court (delivered by myself) in Co-operative Association v. Leflore, 53 Miss. 1 (on page 16), that "it is well settled that all stipulations and conditions contained in the body of an insurance policy are warranties, to the absolute truth of which the parties have pledged themselves." As written, the sentence is erroneous. By some carelessness of the writer the words "*prima facie*," before the word "warranties," were omitted, as is apparent by reference to the citation from Bliss on Life Insurance, section 55, from which the statement was taken. It was intended to state that such conditions and stipulations are, *prima facie*, warranties.

In the case at bar, the fourteenth condition printed on the back of the policy seems intended to declare that, in everything relating to the effecting of the insurance, the agent who procures it shall be deemed the agent of the insured, and not of the insurers. As thus stated, it involves a legal contradiction. The agent binds the company, temporarily at least, by the reception of the premium, and this he could not do if he was wholly the agent of the insured, and in no manner that of the insurers. A man cannot bind others by a contract between himself and his own agent.

I see no difficulty, however, in constituting him the agent of the company for some purposes, and of the applicant for others. For instance, the company might well stipulate that if its agent took part in filling out the application, he should be regarded, *pro hac vice*, as the agent of the applicant, and that neither his acts in so doing nor any information communicated to him should bind them unless transmitted to them by the writing, and by them approved. Such a stipulation, to be binding, should be made known to the applicant in plain and unmistakable language. Good faith would prompt that it should be communicated at or before the making-out of the application, though I will not say that this would be essential. Because the fourteenth condition on this policy was so ambiguous as to be almost unintelligible, I hold it to be unfair, and therefore invalid.

The fourteenth condition being stricken out, I consider it a wholly immaterial whether the statements contained in the application be regarded as representations or warranties. The truth as to all the matters inquired about was communicated to the agent of the company. He dictated or suggested the answers which are now complained of as false. His acts, in so doing, were the acts of his principals. Whether the statements were representations or warranties, they were made to embody untruths, by the insurers themselves, acting through their agent. A man is no more bound by

a false warranty into which he has been entrapped, by the party with whom he is dealing, than by a false representation.

The principle which relieves the insured in this class of cases is the same that authorizes courts of equity to reform written instruments by parol proof, so as to make them conform to the real contract between the parties. It applies as well to covenants and warranties as to their contracts.

NOTES OF RECENT DECISIONS.

RECOVERY OF MONEY PAID OR PROPERTY CONVEYED UNDER DURESS OR UPON FRAUDULENT INDUCEMENT. — *Hoyt v. Dewey.* Supreme Court of Vermont. Opinion by REDFIELD, J. To appear in 50 Vt. 465. 1. Money paid to prevent the exposure of the payer's misconduct, whether criminal or otherwise, can not be recovered in equity. 2. Money paid or property conveyed under duress or upon fraudulent inducement may be recovered in equity. Thus H, who had long been on terms of friendly intimacy with D, a female neighbor, made an assault on her in her own house, with intent to ravish. He had already on several occasions passed the limits of conventional propriety in his intercourse with her, invited her by acts and innuendo to an adulterous intercourse with him, and, several weeks before the time in question, had made a like assault upon her. There was no apparent change in the intimaty existing between them down to the time of the second assault, which was made at a meeting to which D had agreed in the expectation that H would assail her chastity, and that under the observation of a person whom she had admitted into an adjoining apartment as a witness, according to prearrangement. Immediately after the second assault, D, appearing to be in great distress of mind, summoned D, her brother, who, acting in his sister's behalf, invited H to an interview, and there charged him with an attempt to outrage his sister's person, and told him that she purposed to pursue him with such appliances as the law would afford, unless he gave her a large sum of money in compensation. On the following day H paid a large sum of money and conveyed property to B for the use of D. H filed a bill against D and B to recover the money and property. *Held*, that as the distress of D was feigned, the money and property were procured by both fraud and duress, and that the defendants should repay and reconvey the same.

POWER OF ARBITRATORS TO AWARD COSTS.—*Burnell v. Everson.* Supreme Court of Vermont. To appear in 50 Vt. 449. Arbitrators have power under a general submission to award costs of arbitration, including their own fees. PIERPONT, C. J. This action is brought to recover the one-half of the amount of the arbitrators' fees that were awarded to be paid by the plaintiff by a board of arbitrators appointed by the plaintiff and defendant to settle certain matters of difference between them. It appears from the case that in the submission nothing was said as to the costs of the arbitration. The arbitrators awarded that the plaintiff, Burnell, should pay their fees, amounting to the sum of $60. Afterwards they sued Burnell for their fee, and obtained judgment therefor. Burnell paid the judgment, and brought this suit, and the question now is, whether he can recover one-half of this defendant. It is claimed on the part of the plaintiff that the arbitrators, in awarding that he should pay their fees, exceeded their authority, and that their award in that respect is void; and, in support of this claim, the case of Morrison v. Buchanan, 32 Vt. 289, is mainly relied on. In that case the suit was brought upon the submission bond, and the principal point litigated was, whether the arbitrators had in fact awarded that Buchanan should pay the arbitrators' fees. They awarded that he should pay the costs of the arbitration; they taxed Morrison's costs and fixed the precise amount that Buchanan should pay, but did not include in that sum their fees. The court held that there was no award that Buchanan should pay the arbitrators' fees; and, of course, his refusal to pay them was not a breach of the submission bond, and there could be no recovery against him. In disposing of the case, the late Chief Justice Redfield discusses at considerable length, and with his accustomed ability, the question as to the authority of arbitrators to award as to the costs of the arbitration when the authority is not expressly given by the submission, and says that the rule in England, and in Massachusetts, and several of the other states, is against the authority; that in Connecticut, New Hampshire and New York, the rule is in favor of the authority; and concludes by saying that the weight of American authorities seems to be against it. It is a noticeable fact that neither the judge in disposing of the case, nor the counsel in their briefs, make any allusion to the decisions of the courts in this state upon the question. In Hawley v. Hodge, 7 Vt. 237, Chief Justice Williams says: "There is no question that it is incident to the authority given to an arbitrator in a general submission, when no mention is made of costs, to award concerning the costs of the arbitration." In the case of Bowman v. Downer, 28 Vt. 532, it was expressly decided that arbitrators have authority to award as to the costs of the arbitration when the submission is silent upon that subject. Isham, J., after referring to the rule as established in England and some of the states, and to the case of Hawley v. Hodge, says that the principle laid down in that case "having been early adopted in this state, and the general practice being in conformity with it, we must consider the rule as settled. We think, therefore, that the plaintiff is entitled to recover in this case the amount of that award." The case of Morrison v. Buchanan can not be regarded as overruling these decisions, as the case turned upon a different question; and unless we are prepared to overrule them, we must regard the principle as established in this state, that arbitrators, under a general submission, have power to award as to the cost of the arbitration, including their own fees. This being so, it follows that upon the facts stated in this case, the plaintiff can not recover.

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

[Filed October, 1878.]

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE,
" JAMES L. WORDEN,
" GEORGE V. HOWE,
" SAMUEL E. PERKINS,
} Associate Justices.

PROMISSORY NOTE—INDORSERS LIABLE AS MAKERS.—Action by appellees against Browning, Parker and Colclazer on a promissory note drawn by Colcazer, payable at a bank in New York, and indorsed by Browning & Parker. It was alleged in the complaint that Parker and Browning indorsed the note, intending to become jointly liable thereon with Colchazer,

HOWK, J.: When a note is indorsed concurrently with its execution, and at or before its delivery to the payee thereof, by persons other than such payee, the liability assumed by such indorsers, though presumptively that of indorsers merely, may be shown by parol evidence to be the liability of joint makers, or of guarantors of the note, according to the intention of the parties and the facts of the case. In this case, the allegations in the complaint that Parker and Browning indorsed the note, intending to become jointly liable thereon with Colclazer, was a material allegation, and not having been specially controverted by the defendants, must be taken as true. The judgment therefore holding them jointly liable as makers was correct. Affirmed.—*Browning v. Merritt.*

A DISCHARGE IN BANKRUPTCY CAN NOT BE COLLATERLLY ATTACKED.—This was a suit upon a promissory note. The defendants answered that they had been discharged in bankruptcy. The plaintiff replied that he had no notice of the bankruptcy proceedings; that defendants had failed to exhibit certain property in their schedule, and that the discharge was illegal. Judgment was entered for the defendants. PERKINS, J.: A judgment of a court of general jurisdiction in a case requiring ordinary adversary proceedings, where it has jurisdiction of the subject-matter and of the person, is not void, and can not be attacked collaterally for fraud or irregularity in the proceedings in which it was obtained. 6 Ind. 76, 324. The United States District Court, sitting in bankruptcy, is such a court. A discharge in bankruptcy can not be impeached collaterally for any of the causes alleged in the reply in this case. 117 Mass. 17; 27 Ohio St. 452. The remedy for fraud and other irregularities in obtaining his discharge by a bankrupt must be sought by an application to the court in which the discharge was granted, to set the same aside, which said court may do under section 34 of the bankrupt act. It is not denied that the creditor had notice by publication, and this gives jurisdiction, 63 Mo. 143. Judgment affirmed. — *Wiley v. Paney.*

DEFECTIVE COMPLAINT CURED BY JUDGMENT. — Suit to foreclose a mortgage given to secure promissory notes. The complaint did not aver the identity of the notes filed with it, and those described in the complaint. The defendant appeared but refused to answer, and the cause was submitted to the court for want of an answer, the evidence heard and finding a decree for plaintiff, to which the defendent took no exception. PERKINS, J.: The fact that the complaint does not state a cause of action may be brought before the court in three ways. First, by a demurrer; second, by a motion in arrest of judgment; and third, by assigning the fact as error in the supreme court The rule of decision on this point is not the same in all three cases. When it arises upon a demurrer to the complaint, the court can not assume that the plaintiff can prove anything beyond what he alleges therein; if the allegations of the complaint are insufficient, the demurrer must be sustained. But when the question is presented by a motion in arrest of judgment, or by assignment of error in the supreme court, if the deficiences in the complaint have been waived or supplied by evidence admitted without objection, the cause can not be reversed on appeal, though on demurrer the complaint would have been held bad. The complaint in this case would have been bad on demurrer, but judgment having been rendered without objection, it will be presumed that all the facts necessary to entitle the plaintiff to recover were proved, and the defect in his complaint cured by the finding and judgment of the courts. Affirmed.—*Scott v. Zartmar.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July Term, 1878.

HON HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

ACTION — FALSE PRETESES. — A right of action exists against two or more persons who, by consort of action, fraudulently and by false pretenses induce the plaintiff to leave his business and his home and travel into another state. See Wanzer v. Bright, 52 Ill. 35; Phelps v. Goddard, Tyler, 60; Grainger v. Hill, 4 Bing. (N. C.), 212; Heywood v. Collinger, 9 Ad. & El. 268. Opinion by LORD, J.—*Cook v. Brown.*

HUSBAND AND WIFE—CONVEYANCE — FRAUD.—A conveyance of real estate by a husband for a valuable consideration, through the intervention of a third person, to his wife, will not render hay, cut on said estate by the wife and put it into her barn, liable to attachment and sale on execution by a subsequent creditor of her husband, unless the conveyance was made with a design to hinder, delay and defraud his creditors, and the wife participated in that design. Opinion by LORD, J.—*Dodd v. Adams.*

TORTS — DEFECTIVE STAGING—INJURY— LIABILITY.—1. Where a religious society, acting through a committee consisting of two of its members, have contracted with a carpenter to erect and remove a staging required in the work of frescoing its building, and, by the same committee, has contracted with a painter to do the frescoing; if the evidence shows that the society has, after its completion, accepted the staging, and has in effect invited and induced the painter or his employee to come upon it, it is liable to him for injury occasioned by a dangerous condition of such staging, which was not apparent to him, and which was caused by negligence in its construction. Elliott v. Pray, 10 Allen, 378; Gilbert v. Nagle, 118 Mass. 278; Pickard v. Smith, 10 C. B. N. S. 470; Indermaner v. Dames, L. R. 1 C. P. 274, and L. R. 2 C. P. 311; Holmes v. Northeastern Ry., L. R. 4 Ex. 254; Coughtry v. Globe Welend Co., 54 N. Y. 124. 2. In such a case the society and its committee can not be jointly sued. Opinion by GRAY, C. J.—*Malchey v. Trustees.*

CONSTRUCTION OF UNITED STATES STATUTE OF 1851, CH. 43.—The United States statute of 1851, ch. 43, exempting shipowners from any liability for loss by fire, not caused by their own design or neglect, and limiting their liability for losses by other causes without their privity or knowledge to the amount or value of their interest in the ship and freights, does not diminish or in any way affect their liability at common law for injuries caused by their own neglect. In sec. 1, which takes away the owner's liability for loss or damage to goods "by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners," the words "such fire" evidently refer to the previous words "fire happening to or on board," and if the neglect of the owners is the cause of the fires breaking out on the ship, it is wholly immaterial whether and how the fire originated elsewhere. The provision of sec. 4 of the act of Congress, and the rules of the Supreme Court of the United States for apportioning the sum, for which shipowners may be liable amongst the parties entitled thereto, apply only to claims which are limited by sec. 3 of the

act. A proceeding in admiralty under that section and those rules is substantially a proceeding *in rem* for the distribution of a fund, and does not determine the question of the owner's liability, except to those whose claims are limited by the act, or possibly others who voluntarily become parties to the cause. It can not affect the rights of those who have not submitted themselves to the jurisdiction, and whose claims are not limited to the amount to be distributed, but rest upon the owner's personal liability at common law as a wrong-doer. See the same case reported in 113 Mass. 495; Knowlton v. Providence & N. Y. S. S. Co., 53 N. Y. 76; Salisbury Mills v, Townsend, 109 Mass. 115; Harris v. Carpenter. 91 U. S. 254, 257. Opinion by GRAY, C. J.—*Hill Manufg. Co. v. Providence & M. Y. S. S. Co.*

ABSTRACT OF DECISIONS OF SUPREM E COURT OF WISCONSIN.

August Term, 1878.

[Filed October 8, 1878.]

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, }
" WM. P. LYON, } Associate Justices.
" DAVID TAYLOR, }
" HARLOW S. ORTON, }

WHERE DELIVERY OF A COPY OF ANY WRIT or other paper in an action is a necessary part of the service thereof, the fact that plaintiff voluntarily furnishes such copy does not affect the sheriff's right to demand the statutory fee for making it, under sec. 1, ch. 133, Rev. Stats. 1858. Opinion by LYON, J.—*Bound v. Beach.*

TAX SALES—ASSIGNMENT OF CERTIFICATES. — 1. An assignment by the county of the certificates of tax sales made to it, is necessary to enable any other person to maintain an action upon such certificates. 2. H purchased and took a deed from a county of lands upon which it held tax certificates; and the certificates were delivered to him without other consideration therefor than that paid for the lands. Afterwards he sold the certificates to K, who brought an action against the county for the amount of them, on the ground that the sales were invalid; but it did not appear that K had ever been disturbed in the possession of the lands. *Held*, (1.) That it would not be presumed, on these facts, that the certificates were duly assigned by the county to H upon their transfer to him. (2.) That, apart from any lack of assignment, neither H nor his assignee could, under the circumstances, maintain an action against the county for the amount of these certificates. Opinion by COLE, J.—*Kruaer v. Supervisors of Wood County.*

STATE TREASURER —LIABILITY FOR MONEYS IRREGULARLY ADVANCED— BANKRUPTCY. — 1. If the state treasurer pays an appropriation before the time of payment appointed by law, or without the warrant of the secretary of state when such warrant is required, he will be liable for any damages resulting to the state from such irregular payment. But where such a payment of a legislative appropriation for the state hospital for the insane was made to the treasurer of said hospital, who was the person appointed by law to receive it, and was receipted for by him in his official character, and used by him to pay claims against the hospital for whose payment the money was by law appropriated, and the amount paid was placed to the treasurer's credit in the books of the secretary of state (even if irregularly): *Held*, that the state treasurer, after the money became by law due and payable to the hospital treasurer, was not bound to refund the amount to the state treasury, and his failure to pay over the same to his successor in office was not a breach of his official bond. 2. The hospital treasurer received the state treasurer's bank check as money, and after the appropriation became legally payable to him, receipted to the state treasurer for the amount as money. He loaned the check as money to the bank on which it was drawn, and received from the bank, to secure the loan collaterals, on which he collected a sum of money exceeding the amount of the check, and with such money took up orders duly drawn on him as hospital treasurer for liabilities of the hospital. The assignee in bankruptcy of said bank recovered from him the amount so collected on the collaterals. *Held*, that he received and expended the money as hospital treasurer, and relieved the state from all liability on the demands for which such orders were issued; and his mental election "to consider the money collected on the collaterals as held by him for the assignee, if such assignee should recover the same, and the hospital orders as his individual property," could not change the legal character and effect of his acts. Opinion by LYON, J.—*State v. Baetz.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.

[Filed October 30, 1878.]

HON. W. W. JOHNSON, Chief Judge.
" JOSIAH SCOTT, }
" D. T. WRIGHT, } Judges.
" LUTHER DAY, }
" T. Q. ASHBURN, }

1. NOTES SECURED BY THE SAME MORTGAGE when transferred to different holders are to be paid in the order of their maturity, unless a different intention is expressed by the parties. 2. If the facts or circumstances exist to make the order of priority other than the order of maturity, such facts or circumstances must be shown by the party claiming to vary this order. Judgment of the district court affirmed. Opinion by WRIGHT, J.—*Winters v. Franklin Bank of Cincinnati.*

ATTACHMENT—PETITION — PRACTICE.—1. A writ of attachment under the code without the requisite affidavit is void. 2. The seizure of property of a non-resident debtor upon whom service of summons can not be made, on such void writ, does not give the court such jurisdiction over the defendant, or his property, as will authorize a service by publication, or a judgment in the action. 3. The affidavit required by section 192, of the code, forms no part of the pleadings in the case, and should not be incorporated in the petition, but if the omission of a separate affidavit can be cured by a showing in the petition, it should contain all the requisites of an independent affidavit and be duly verified. 4. Where the petition, treated as an affidavit for an attachment, does not show that the claim sued on is just, nor state the amount the affiant believes he ought to recover, aad is verified upon belief merely, it is sufficient to cure the omission of a separate affidavit. 5. In an action for money only, where an attachment is sued out and levied on lands of a debtor, a mortgagee of the land seized in attachment is not a proper party to the action. 6. In such a case, the attaching creditor can not have relief in equity to

satisfy his claims until after he has obtained a judgment and exhausted his remedy at law. 7. To bar the equity of redemption of a non-resident mortgagor, upon whom service of summons can not be made, such mortgagor should be constructively served as required by the code, and a judgment of foreclosure and sale, without such service, is no bar to an action to redeem. Judgment reversed. Opinion by JOHNSON, C. J.—*Endell v. Liebroch.*

[Filed October 23, 1878.]

PETITION IN ERROR—CONSTRUCTION OF DEVISE—CONSTRUCTION OF STATUTES AS TO REAL ESTATE.—1. An authenticated transcript of a complete final record in the case was filed with the petition in error in the district court, and the clerk of the court, on his own motion, also placed the original papers and pleadings in the case among the files, without endorsing thereon additional file marks. *Held*, it was not error to overrule a motion to dismiss the petition in error for want of jurisdiction. 2. Where a husband devised real estate to his wife during her life, or while she remains unmarried, under which she takes possession and occupies the land with the knowledge of the heirs at law for a series of years after the time limited in which she may make her election, in the absence of a showing to the contrary she will be presumed to have made her election in fact. 3. A testator by his will clearly vested the title to a specific portion of his real estate in his executors in trust, with directions to sell the land and distribute the proceeds equally among his heirs at law, and it is claimed the executors are vested with a like trust and direction in and over other real estate devised. *Held*, that the court, in order to ascertain and carry out the intention of the testator in that respect, will look to the whole will and all its parts. 4. W devised to his wife H and his son J H W by a distinct and independent clause of his will, the use of certain estate during the life of H, or while she remained unmarried, and then provided: "But at the death of my said wife, or if she should intermarry with any other person after my decease, it is my will that the said aforementioned and described farm shall be sold and the proceeds of the same be equally divided between my children or their heirs forever; or that they, my said children, divide said farm to suit themselves as they may think best." *Held*, (1.) By this devise, standing unaffected by the other provisions of the will, no trust estate is created in the executors. (2.) Under this clause H and J H W take estate for life in the land described therein, determinable on the death or marriage of H, with remainder in fee to the heirs at law of the testator. 5. The act of April 13, 1865, entitled "An act supplemental to the act to authorize the sale or lease of estates tail and estates for life in certain cases," by negative provision extends and applies the acts of April 4, 1859, and March 30, 1864, to all estates, tail or for life, with remainder over to any other person or persons, and to all determinable estates which may be created by will, etc., after its passage. 6. Under the act of April 4, 1859, and the acts supplemental thereto, the owner of the life estate in possession, created by will subsequent to April 13, 1865, may institute proceedings for the sale of both the life estate and the estate in remainder; and this may be done notwithstanding the testator may have made special direction in his will for the disposition of the land on the determination of the life estate. 7. The act of April 4, 1859, S. & C, 550, and the supplemental acts of March 30, 1854, S. & S. 346, and April 13, 1865, S. & S. 347, in so far as they affect and apply to estates created subsequent to their passage are not in contravention of section 19 of article 1 of the constitution of this state. Judgment affirmed. Opinion by ASHBURN, J.—*Nimmons v. Westfall.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877.

[Filed October 30, 1878.]

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
" JOHN W. OKEY,
} Associate Justices.

"CIVIL DAMAGE" LAWS—EVIDENCE.—In an action for damages resulting from the sales of intoxicating liquors, under the seventh section of the statute on that subject (67 O. L. 102), it is not necessary that the illegal sales should be proved beyond a reasonable doubt. Opinion by OKEY, J.—*Lyon v. Fleahmann.*

WHERE A NEGOTIABLE PROMISSORY NOTE is transferred by indorsement, after maturity, the legal title is thereby vested in the indorsee; and after the indorsement the amount due on the note can not be garnished in the hands of the maker, whether he has notice of the transfer or not, as a debt due to the original holder. Judgment affirmed. Opinion by WHITE, C. J.—*Knisely v. Evans.*

1. AS BETWEEN A COPARTNERSHIP AND A CREDITOR thereof, a note given in the firm name, without authority, by one partner, after dissolution, for a debt of the firm, the parties to the note intending to bind, and believing the note was binding on the firm, will not extinguish the firm debt. 2. As between the partners themselves, such transaction will not discharge the non-consenting partner from liability to make contribution to the partner paying the debt. Judgment affirmed. Opinion by GILMORE, J.—*Gardner v. Conn.*

DOWER—ELECTION—SETTLEMENT.—1. Where dower is barred by a legal jointure, an election, under the 43d section of the will's act, is not necessary to entitle the widow to take the provisions made for her in her husband's will; but where the bar is by an equitable jointure or settlement merely, *quere?* 2. The year within which the election under said section must be made, begins to run from the date of the service of a citation, and where the widow, appearing in open court without service of a citation, declines to make her election, she does not thereby waive the issuing and service of a citation, or estop herself from denying that a citation had been issued and served. 3. Whether a widow can take the provision made for her in the will of her husband, and also claim under an ante-nuptial contract, whereby her right of dower is barred, depends on the intention of the testator. 4. Where, by ante-nuptial settlement a sum of money is secured to the wife to be paid after the husband's death, and by a subsequent will the husband directs all his just debts of every kind to be first paid, and makes provision for the support of his wife during widowhood, with a declaration that the intent and meaning of the testator was to give to his wife the provision made for her in his will, she may claim the provision in the will, and also that made for her in the settlement. Opinion by MCILVAINE, J.—*Bowen v. Bowen.*

PRACTICE—PETITION IN ERROR.—Under the act of April 14, 1878, to revise the laws relating to civil procedure, sec. 3, ch. 1, 4, 75 O. L. 804, the applicant may file his petition in error in the district court without leave. Hence, where there are no special reasons for coming directly to this court, the applicant should

seek his remedy in the district court. The rule applied to applications for leave made to this court directly from the court of common pleas, is applicable in the present case. Benham v. Conklin, 3 Ohio St. 509; State v. Williams, 26 Ohio St. 170. Opinion PER CURIAM.—*Kosminski v. Barrett.*

BOOK NOTICES.

REPORTS OF CASES DECIDED IN THE SUPREME COURT of the State of Oregon. C. M. BELLINGER, Reporter. Volume VI. San Francisco: A. L. Bancroft & Co. 1878.

The sixth volume of the Oregon reports contains the cases decided from the December term, 1876, to the December term, 1877, — nearly 100 in all. Among them the following points are decided: Permitting a jury to take a written charge to the jury room held to be erroneous: *Smith v. Lownsdale*, p. 78. The president of a railroad with authority to act as "business and financial agent" of the corporation has no power to execute a mortgage on the property of the road: *Luse v. Isthmus Transit Ry. Co.*, p. 125. A promise, though without consideration, may be enforced if for a public object: *Philomath College v. Hartless*, p. 158. The moral character of a witness can not be impeached by showing particular acts of immoral conduct: *Leverich v. Frank*, p. 212. The jurisdiction of a court of equity to enforce the provisions of lost instruments: *Howe v. Taylor*, p. 284. A person may in the same act commit more than one crime. Thus, a city ordinance which provides for punishing an act which is already a crime under the general laws of the state, does not deprive the circuit court of its jurisdiction to indict and try persons who are guilty under the ordinance for a violation of the state law: *State v. Bergman*, p. 341. A contract made by a foreign corporation before it has complied with the state laws regulating such corporation is, as to third parties, void, and can not be enforced against them: *Bank of British Columbia v. Paige*, p. 431.

The volume contains over 500 pages. A list of attorneys admitted to the Supreme Court during the term of the reports, and the rules of the court are prefaced.

REPORTS OF CASES IN THE SUPREME COURT OF NEBRASKA. 1868. Vol. VII. By GUY A. BROWN, Official Reporter. Lincoln, Nebraska. State Journal Co. 1878.

This volume contains a report of all decisions of this court filed prior to the October term, 1878, and not reported in the preceding volumes of this series. It contains 587 pages and over 100 cases. In an appendix, are given the proceedings in the Supreme Court on the death of the Chief Justice, which occurred on the 29th of May, 1878. Chief Justice Gantt was born in Pennsylvania in 1814. He went to Nebraska in 1857, and practised in Omaha till 1864, when he removed to Nebraska City. He was United States District Attorney in 1863, and was first elected a judge of the Supreme Court in 1872. He is succeeded in the Chief Justiceship by Hon. Samuel Maxwell, formerly an associate justice of that court. In this volume we notice the following decisions: A mistake or abbreviation in the name of a grantee in a deed does not necessarily invalidate it, but may be explained by extrinsic evidence: *Aultman Manfg. Co. v. Richardson*, p. 1. A bank is barred by the representations of its president: *Kennedy v. Otoe Nat. Bk.*, p. 58. Parol testimony is not admissible to prove the surrender of leased premises: *Kittle v. St. John*, p. 73. To what facts the cross-examination of a witness must be restricted: *Davis v. Neligh*, p. 84. The employment of an attorney by the state not valid unless expressly authorized by law: *Bradford* v. *State*, p. 109. A contract to operate in grain options is void: *Rudolf v. Winters*, p. 125. The written agreement of attorneys, or those entered into by them in open court, in regard to the disposition of causes will be enforced, but oral agreements out of court will not: *Rich v. State Nat. Bk.*, p. 201. Where one week's publication of a city ordinance is required, one publication fills the requirement of the law: *State v. Hardy*, p. 377.

QUERIES AND ANSWERS.

[Correspondents in this department are requested to make their questions and answers as brief as possible. Long statements of facts of particular cases will be rejected Anonymous communications will not be noticed.]

QUERIES.

72. HAS THE ADMIRALTY COURT jurisdiction of libels against vessels of less than two tons burthen? If not, cite some authorities. S.

73. DEFINITIONS—"SERVANT"—"AGENT"—"MERE SERVANT."—What is the strict legal difference between an "agent" and "servant?" Also the difference between a "servant" and "mere servant?" These questions have been discussed here of late, but have never been reduced to any settled distinction, but admitted by the majority that there is a difference.

Louisville, Ky., Nov. 1, 1878. Y. T. S.

ANSWERS.

No. 64.

[7 Cent. L. J. 260.]

The case of Knapp v. Gass, 63 Ill. 492, decided that the homestead "should contribute to dower as well as the other property." This decision was rendered June 18, 1872. Section 37, Rev. Stat. of Ill. 1877, ch 41, in force July 1, 1877, provides that "the surviving husband or wife shall have the homestead or dwelling-house if he or she desires, and such allotment shall not affect his or her estate of homestead therein; but if the dower is allotted out of other lands, the acceptance of such allotment shall be a waiver and release of the estate of homestead of the person entitled to dower, and his or her children, *unless it shall be otherwise ordered by the court.*" By a former enactment, in force July 1, 1873, the right of homestead became an estate and exempt from the laws of "conveyance, descent and devise," as well as from payment of debts. Rev. Stats. 1877, ch. 52, § 1. Under this act, until July, 1874, a dowress would be entitled to both estates regardless of the penury of a child or heir of the deceased, and the statute of 1874 was doubtless enacted with a view to prevent this injustice. And the law would therefore seem to be that, "unless otherwise ordered by the court," it would be error to take a decree for both dower and homestead out of independent parcels of the same estate, where the dower interest is of more than $1,000 value; since if the dower is assigned out of other lands than that occupied by the same homestead, the latter is waived. In such cases, the two estates, to the extent of $1,000, should occupy the area. This rule accords with the principle of justice which doubtless led to the passage of the act above quoted. It may be argued that even following a literal construction of the laws above cited, the estates of dower and homestead may be set off so as in part to

occupy different lands where the dower estate is worth less or no more than $1,000, provided the estates each include the dwelling-house; and this although the court has not decreed that such an assignment shall constitute no "waiver." But the answer is that, in view of the law and the reasons for its enactment, such a provision would be unjust and unreasonable. The law in question should be construed to meet the beneficient design that promoted its enactment. And "where the reason ceaseth there the law ceaseth also." Where, therefore, the court does not "otherwise provide," under the law of 1874, the case of Knapp v. Gass has no application, since a different rule is provided by statute. But suppose the court to decree that the acceptance of dower in some other part of an estate shall constitute no waiver of the homestead estate of the doweess, which may frequently be done from highly deserving considerations. How should the two estates be set off? Such an event would place the case precisely as it would have been before the act of 1874 was passed, and there being no other rule, that declared in the case above cited must apply, and the "homestead should contribute to dower as well as the other property." This can only be done by first assigning the estate of homestead; 2d, set off one-third of that estate as dower; 3d, out of the general estate, exclusive of the homestead estate, assign one-third, according to quantity and quality as dower. J. N. S.

Quincy, Ill.

No. 54.

[7 Cent. L. J. 179.]

A placed B in possession of the land purchased by the latter, under a deed with a mistaken description. B then obtained what he purchased under a deed which, as between A and B, would be reformed on proof of the mistake, by decree for further conveyance. As between A and B, the remedy of the latter was, if proceedings became necessary, in equity to reform the deed. But B relies on his deed, without using that diligence which could have discovered the mistake, and conveys to C, taking back a consideration mortgage on the wrong premises, thereby falling into the same mistake, on his part, which A had committed. This was *his* mistake. He had no right to continue the mistake, since he, *ex necessitate rei*, could have discovered it by due inspection of the records. He chose to sell the land without this inspection, which, if had, would have enabled him to protect himself, both as against A, and also in this act of his own, to wit, a sale procted by a mortgage for the purchase-money; but he negligently falls into the mistake of another, and makes it his own act. His remedy, now, is against his vendee on the covenants of the mortgage, and if there be none, or none covering the case, or if there be no personal bond or obligation of the vendee, he is remediless, since he did not use diligence in ascertaining and enforcing his rights as against A, while in possession of the land, and he was equally negligent (*concedendum*) in providing for them as against C. Had he sought professional aid in the first instance, or advice later, he would doubtless have escaped the slough of despond in which he seems fastened. And evidently the case of B is the ordinary case of one who "knows all about it himself," and grudges the comparatively trifling fee for professional aid, which would have protected him in the end from loss. M. S.

The answer of D to question No. 54 is all good enough, so far as it goes, but it does not reach the case I put in the statement of the question. The court undoubtedly erred in not reforming the mortgage. There is no error of any kind properly taken on the record. So an appeal is out of the question. B has no remedy against A. I holds under order of court all properly made, so far as B is concerned. A was made a party to the foreclosure by B, in his suit against C to foreclose. A stood by failing to defend—after he knew of his own mistake. B's remedy is gone entirely, unless he can maintain an action against A, on the ground of mistake. Can he do this? J.

No. 65.

[7 Cent. L. J. 14.]

A conveyed to B the N. 200 feet of block 34, and in October, 1877, B conveyed to D. If the conveyances from A to B and from B to D were declared void, and A and wife were deceased, the title would vest in the heirs of A and descend to then, subject to the incumbrances placed by A, in his lifetime. To say that the title would still remain in D, as assumed by the question, would be paradoxical. D could not set up homestsad exemption, as against the creditors of A, nor against his own creditors, because his title was declared void; and E, the judgment-creditor, in asking to have D's title to the west 75 feet set aside, is simply asking for what has already been done.

NOTES.

HON. ELIJAH H. NORTON has been re-elected to the Supreme Court of this state.——The annual meeting of the St. Louis Bar Association was held on the 4th inst. The following officers were elected for the ensuing year: Alexander Martin, President; Alonzo W. Slayback, Henry Hitchcock and George W. Stewart, Vice Presidents; J. C. Withrow, Secretary; John W. Dryden, Treasurer. A report on the jury system in St. Louis was read, and the question of a change in the practice act of this state discussed.——The following interesting suit was lately instituted in the United States Circuit Court, for the District or Louisiana. A took a prominent part in the Rebellion, consequently his property in New Orleans was confiscated and sold. But, before its sale, he (A) went to New Orleans, took the oath of allegiance to the United States government, and attended the sale and bought *his own property*. Soon afterwards he sold one piece of property, being joined in the sale by his wife, to B. A soon afterwards died and his wife comes in and claims that, inasmuch as the sale was one of confiscated property, that A only acquired a life's interest in the property, and hence the transfer made to B was only to exist during the life of A. Eminent counsel have been retained on both sides, and the decision is awaited with much interest. ——A subsariber sends us a copy of a petition recently filed in an Iowa court. It is as follows: "Comes now the plaintiff in this case by his attorney ——, and for cause of action alleges: First. That said plaintiff holds a certain promissory note made and executed by said defendants, for a valuable consideration; that said note is for the principal sum of eighty dollars; that it is and has been due and unpaid for the term of nearly four years. Second. That said defendants have been frequently importuned to pay said notes, and though said importunities have been made with the greatest mildness, the defendants have not only disregarded them, but have also resisted said importunities with great pertinacity; that the plaintiff verily believes that said defendants intend to evade the payment of said note. Therefore, said plaintiff prays that he may have judgment against said defendants for the amount of said note, with costs and twenty-five dollars attorney fees."